Filed 7/28/09 Marriage of Brace CA2/6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re Marriage of KYLE and ROBERT BRACE.	2d Civil No. B207379 (Super. Ct. No. 1164498) (Santa Barbara County)
ROBERT L. BRACE, Respondent, v. KYLE J. BRACE, Appellant.	

Kyle J. Brace (Kyle) appeals a judgment after the trial court denied her motion to set aside a Marital Settlement Agreement (MSA) in the dissolution action filed by her husband Robert L. Brace (Robert).[1] We conclude, among other things: 1) a provision in the MSA which gives Robert a right of first refusal if Kyle exercises an option to sell their home to a third party is reasonably specific and enforceable, and 2) that Robert did not file a final financial disclosure statement prior to a hearing on their settlement does not warrant setting aside the MSA. We affirm.

[1] We refer to the parties by their first names, not out of disrespect, but to ease the reader's task.

FACTS

Kyle and Robert were married in 1990. They separated 14 years later. Robert filed a petition for dissolution of their marriage. A major community asset was their home which had a market value of $2,750,000.

In June of 2007, the parties attended a settlement conference before a retired judge. They agreed to divide the community property as follows: Kyle will have the home. Kyle will pay Robert $900,000 on or before September 1, 2010, and have the right to record a judgment for that amount. Kyle "can sell the house on or before September 1 of 2010," but Robert "has a right of first refusal before [Kyle] signs a contract for the sale of the house."

Kyle's attorney asked Kyle, "[H]ave you listened to the terms and conditions that were read into the record by Judge Reiner?" Kyle: "Yes, yes, I have." Counsel: "Do you understand all of those terms and conditions?" Kyle: "Yes." Counsel: "Are you willing that the terms and conditions shall become an order of this Court?" Kyle: "Yes." Counsel: "And you are willing to abide by those terms and conditions, is that correct?" Kyle: "Yes."

On December 11, 2007, Kyle filed a motion to set aside the MSA. She claimed it "was entered into without an exchange of either a preliminary or final [financial] declaration of disclosure" and "was premised on a mistake of fact concerning . . . [Kyle's] right to refinance the residence she received in the Settlement . . . ." She said the MSA was "unenforceable" because it omitted a provision that would define Robert's right of first refusal. In her declaration, Kyle claimed she made the settlement based on Robert's representation that his annual income for 2007 would be "going down" and would be only "$250,000 or less." She claimed the settlement proceedings should have been delayed until after Robert's final income and expense declaration for 2007 was filed, and the settlement "was dependent on" her ability to obtain loans on the equity of the home.

Kyle attached a declaration from Maddox Rees, a loan consultant, who said that the home was encumbered by a first and second deed of trust and Robert's $900,000

judgment. Robert claimed that lenders would be discouraged from giving Kyle a loan on the remaining equity because they would be "in fourth position vis-à-vis the security." A lender would be concerned that "if any of the prior loans go into default, the lender will have to cure those defaults in order to avoid having its security interest 'sold out' to the senior lienholders."

In his declaration in opposition, Robert claimed Kyle was adding terms to the MSA. He told Kyle before the settlement that he would not agree to subordinate his security interest in the home "to any post-settlement loans obtained by [Kyle] and secured by the property." He said, "the MSA was read into the record and agreed upon by both parties" and Kyle was represented by counsel. "There was no mention that [Kyle] would borrow additional money from a lender with a security interest superior to mine because this was discussed and specifically rejected by me in front of [Kyle's counsel] and Judge Reiner." He said, "At no time did I guarantee that [Kyle] could obtain a loan." He served his income and expense declaration and the other financial disclosure document he was required to produce before the settlement.

The court denied the motion. It ruled that Kyle was attempting to add provisions to the MSA that had not been agreed to by the parties. It found she was estopped to claim that the MSA must be vacated because the settlement took place before Robert's final 2007 financial disclosure statement was due.

On February 4, 2008, Kyle filed an objection to Robert's request to enter a proposed judgment. The objection was based "on all grounds set forth" in her prior motion to set aside the MSA. Robert responded with a declaration and said, "I never concealed my 2007 income from Kyle . . . . I do not make material omissions or material misstatements. Never have, never will." The matter was set for a hearing; no witnesses were called to testify.

On February 27, 2008, the court entered a judgment of dissolution of marriage and ruled that the settlement agreed to by the parties on June 1, 2007, "has been confirmed and approved by the Court."

DISCUSSION

I. The Right of First Refusal

Kyle contends that the description of Robert's right of first refusal on her option to sell the home was too uncertain and "unspecified" to be enforceable. She claims the trial court erred by denying her motion to set aside the MSA. We agree with Robert that the provision is specific and unambiguous.

"'Property settlement agreements occupy a favored position in the law of this state . . . .'" (*In re Marriage of Egedi* (2001) 88 Cal.App.4th 17, 22.) Where the provisions of a MSA are clear and explicit, courts will enforce the terms exactly as specified by the parties. (*In re Marriage of Iberti* (1997) 55 Cal.App.4th 1434, 1440.) A party challenging the MSA may not use extrinsic evidence "to support a meaning to which the agreement is not reasonably susceptible." (*Ibid.*)

"California has recognized that a right of first refusal is a 'preemptive right to purchase property on the terms and conditions of an offer to purchase by a third person.'" (*Pellandini v. Valadao* (2003) 113 Cal.App.4th 1315, 1322.) The holder of the right may exercise it before a buyer enters into a contract to purchase the real estate. (*Ibid.*)

The MSA provides that Kyle has the option to "sell the house on or before September 1 of 2010" and Robert "has a right of first refusal before [Kyle] signs a contract for the sale of the house." Robert's right of first refusal is directly connected to Kyle's exercise of her option to sell the home.

Kyle claims the MSA does not indicate "when, who and in what manner" the right will be exercised. The time period for the exercise of this right is certain--on or before September 1, 2010, and the person who may exercise the option is specific--Robert. The way in which Robert may exercise the option is set forth with sufficient clarity. If Kyle exercises her option to sell the home on or before September 1, 2010, then Robert's right of first refusal may be exercised "before [Kyle] signs a contract for the sale of the house." Because this is a right of first refusal, Robert has the right to purchase "on the terms and conditions" set forth in the third party's offer to purchase.

(*Pellandini v. Valadao, supra*, 133 Cal.App.4th at p. 1322.) The language is sufficiently clear.

Kyle suggests that the MSA required Robert to assist her in obtaining loans on the home's equity and subordinating his rights to the lenders. But she has not cited to any provision in the MSA to support this contention. The trial court found Kyle's claim to be an improper attempt to add provisions to a judicially approved MSA which contained no terms about borrowing. It said, "Adding or subtracting material provisions after the binding settlement was spread on the record is not permitted." It noted that the parties were represented by counsel who had carefully negotiated the MSA provisions and "[t]hey and their clients knew what was said and that constituted 'the agreement.'" It added, "[T]here was no articulation by KYLE at the settlement conference about adding further qualifications. That was the time to speak up. The absence of such qualifications does not translate into a finding that the agreement was not 'binding' . . . ."

Kyle was bound by the provisions of the MSA and may not add terms that were not agreed to in the settlement. (*In re Marriage of Iberti*, *supra*, 55 Cal.App.4th at p. 1440.) Moreover, Robert said that during settlement negotiations he specifically objected to the type of borrowing provision Kyle sought to add in her motion to vacate. He was entitled to rely on the MSA terms and not be subject to changing positions that could negatively impact his interest in the home months after the settlement. Kyle has not shown error.

II. Not Filing the Final Disclosure Statement

Kyle contends that the trial court should have set aside the MSA because Robert did not file the most current 2007 financial disclosure statement. This, she claims, entitles her to a reversal. We disagree.

The failure of the parties to a dissolution action to exchange final financial disclosure statements before they reached a settlement is not, by itself, a ground to set aside an MSA. (*In re Marriage of Steiner & Hosseini* (2004) 117 Cal.App.4th 519, 525-528.) The appellant must show that there was a miscarriage of justice. (*Id.* at p. 525, fn. 3.)

Kyle notes that Robert's income and expense declaration, filed September 27, 2006, shows an annual income of $423,528. But, in 2007, after the settlement, she received his more recent income statement showing his annual income to be $650,000. She claims she would never have agreed to settle if she had known that Robert's income would be so high. She contends the trial court erred by ruling that the doctrine of judicial estoppel precluded her from raising this issue. We disagree.

"Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." (*People ex rel. Sneddon v. Torch Energy Services, Inc.* (2002) 102 Cal.App.4th 181, 189.) "Courts apply the doctrine to prevent internal inconsistency, preclude litigants from playing 'fast and loose' with the courts, and prohibit 'parties from deliberately changing positions according to exigencies of the moment.'" (*Ibid.*)

In finding judicial estoppel, the trial court said Kyle had changed her position about the need for additional financial disclosure statements. "[She] did not raise the issue of the lack of disclosures at the time of the judicially supervised settlement." The court noted that "[t]he settlement judge. . . would not have permitted the matter to continue if the issue had been raised."

Kyle suggests the court erred because "her failure to assert" a need for further financial information is not equivalent to taking a position and later contradicting it. But the court made an additional finding. It said, "[S]he was quite satisfied with the state of discovery until the issue of getting refinancing arose" after the settlement. That finding is supported by the record. Kyle's counsel wrote a letter to Robert's counsel attaching a draft MSA, which she said was "faithful to the settlement reached" on June 1, 2007. It contained a discovery waiver provision that provided that Kyle agreed "that there *has been adequate and unrestricted opportunity* to conduct discovery" and she waived her right to conduct further discovery. (Italics added.) A reasonable inference from this is that Kyle and her counsel had decided that further financial disclosure from Robert was not needed to settle the real estate issue, and that Robert could rely on this waiver. Moreover, Kyle's unequivocal statements at the June 1 hearing constituted

affirmative representations to the settlement judge to proceed and finalize the settlement. But even if the trial court had erred on the estoppel issue, the result does not change because it also ruled on the merits by finding there was "no miscarriage of justice here."

Kyle claims she never had the opportunity to litigate the merits of the issue of Robert's alleged concealment of his income. But the record shows otherwise. Kyle raised this issue more than once--first in the motion to vacate the MSA and later in her objection to the judgment. At the hearings the parties did not request permission to call witnesses, they relied on their declarations, and there were substantial factual disputes. Kyle claimed that Robert said his 2007 income would be $250,000, but he knew it actually was $650,000. But Robert said, "I never concealed my 2007 income from Kyle," and the allegation that "I told [Kyle] my 2007 income would be $250,000 when I knew it would be $650,000 is false." He said he disclosed his 2006 income to Kyle before the settlement and his income varied because it was based mostly on bonuses. He said, "My 2007 income was not known to me until after [the June 1 settlement] because I did not receive my bonus until October 2007."

In finding no miscarriage of justice and in approving the proposed judgment, the trial court implicitly found in favor of Robert on all the contested factual issues in the declarations. "'[W]here the issues are tried on affidavits, the rule on appeal is that the affidavits which favor the contentions of the prevailing party establish the facts stated therein, and all facts which reasonably may be inferred therefrom.'" (*Waller v. Waller* (1970) 3 Cal.App.3d 456, 461.) If there is a factual dispute, its resolution and the affiants' credibility are matters for the trial court. (*Ibid.*) Moreover, the court also essentially made a negative credibility determination about Kyle's lack of financial disclosure claim. It found it was "simply a fall-back argument," and that if Kyle truly felt additional disclosure statements were essential, her "experienced" counsel would have stopped the settlement proceedings. It could reasonably infer that Robert had not falsified or concealed income and Kyle's claim that she would not have entered into the property settlement had she known Roberts' income for 2007 would be higher was not credible.

We have reviewed Kyle's remaining contentions and conclude she has not shown reversible error.

The judgment is affirmed. Costs on appeal are awarded in favor of Robert.

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GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Thomas P. Anderle, Judge

Superior Court County of Santa Barbara

Vanessa Kirker for Appellant.

Hollister & Brace, Paul A. Roberts, Marcus S. Bird for Respondent.